


ORIGINAL

1 K. Lynn Finateri Silbiger (SBN 196488)
 2 HAWKINS, PARNELL & THACKSTON, LLP
 3 444 South Flower Street – Suite 1100
 4 Los Angeles, California 90071
 Telephone: (213) 486-8000
 Facsimile: (213) 486-8080
 Email: lfinateri-silbiger@hplegal.com

5 Attorney for Defendant
 6 TRAUNER, COHEN & THOMAS, LLP

FILED
 2009 OCT -5 AM 11:43
 CLERK US DIST. CT. SOUTHERN DISTRICT OF CALIFORNIA
 BY  DEPUTY

7
 8 **UNITED STATES DISTRICT COURT**
 9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
 11 MIDLAND CREDIT MANAGEMENT, INC., a
 12 Kansas corporation; MIDLAND FUNDING, LLC,
 a Delaware limited liability company; MRC
 13 RECEIVABLES CORPORATION; a Delaware
 corporation; and MIDLAND FUNDING NCC-2
 CORPORATION, a Delaware corporation,

14 Plaintiffs,

15 v.

16 TRAUNER, COHEN & THOMAS, LLP, a Georgia
 17 limited liability partnership, and Does 1 through 10,

18 Defendants.

CIVIL ACTION FILE

09 CV 2187 H RBB

**ANSWER TO COMPLAINT FOR
 BREACH OF CONTRACT;
 NEGLIGENCE/LEGAL
 MALPRACTICE; BREACH OF
 FIDUCIARY DUTY; FRAUD; MONEY
 HAD AND RECEIVED; UNJUST
 ENRICHMENT; AND
 DECLARATORY RELIEF**

19 Defendant TRAUNER, COHEN & THOMAS, L.L.P. (now known as Thomas & Cohen,
 20 L.L.P.) files this its *Answer to Complaint for Breach of Contract; Negligence/Legal Malpractice;*
 21 *Breach of Fiduciary Duty; Fraud; Money Had and Received; Unjust Enrichment; and*
 22 *Declaratory Relief* and shows this Honorable Court as follows:

23
 24 **FIRST DEFENSE**

25 The Complaint fails to state a cause of action against this Defendant upon which relief can
 26 be granted.

27
 28
 ANSWER TO COMPLAINT FOR BREACH OF CONTRACT; NEGLIGENCE/LEGAL MALPRACTICE;
 BREACH OF FIDUCIARY DUTY; FRAUD; MONEY HAD AND RECEIVED; UNJUST ENRICHMENT; AND
 DECLARATORY RELIEF

1 **SECOND DEFENSE**

2 No act or omission of this Defendant either proximately caused or contributed to certain
3 damages the Plaintiff may have sustained and on account thereof, Plaintiff is not entitled to
4 recover such sum from this Defendant.

5 **THIRD DEFENSE**

6 The claims asserted in the Complaint are barred or reduced by the doctrines of
7 contributory negligence or comparative negligence.

8 **FOURTH DEFENSE**

9 Plaintiff's claims are limited by the applicable statute of limitation.

10 **FIFTH DEFENSE**

11 Defendant acted at all times in accordance with the legal and ethical standards governing
12 the legal profession.

13 **SIXTH DEFENSE**

14 Defendant acted in good faith and with reasonable care.

15 **SEVENTH DEFENSE**

16 Venue and jurisdiction are improper in California.

17 **EIGHTH DEFENSE**

18 The punitive damages claims are barred or limited by the due process and equal protection
19 clauses of the Constitution of the United States or the State of Georgia.

20 **NINTH DEFENSE**

21 This Defendant did not breach certain duties owed to Plaintiff.

22 **TENTH DEFENSE**

23 Defendant pleads the right to set off and *quantum meruit* to any damages that Plaintiff is
24 entitled to recover.

ELEVENTH DEFENSE

Plaintiff has failed to properly mitigate damages.

TWELFTH DEFENSE

Any damages to which Plaintiff is entitled are subject to set-off based upon unpaid fees and/or *quantum meruit*.

THIRTEENTH DEFENSE

Further answering the numbered paragraphs in Plaintiff's Complaint, Defendant states as follows:

NATURE OF THIS LAWSUIT

1. Although the nature of the lawsuit should not require any response, in an abundance of caution, Defendant must deny the allegations to the extent that they assume facts not specifically delineated.

THE PARTIES

2. Defendant admits the allegations of this paragraph of the Complaint.
3. Defendant admits the allegations of this paragraph of the Complaint.
4. Defendant admits the allegations of this paragraph of the Complaint.
5. Defendant admits the allegations of this paragraph of the Complaint.
6. Defendant admits that it was a Georgia limited liability company with all of its partners as citizens of Georgia. Defendant is now known as Thomas & Cohen, L.L.P.
7. Defendant is without knowledge sufficient to form a belief about the existence of any purported John Doe defendants, and therefore must deny same at this time.
8. The contract speaks for itself, but Defendant denies that venue is proper in this Court. Defendants further deny that this venue is the best venue for these claims. Under the

1 doctrine of forum non-conveniens, the United States District Court, Northern District of Georgia,
2 Atlanta Division is the best venue for this action.

3
4 **FACTS**

5 9. Defendant admits the allegations of this paragraph of the Complaint.

6 10. Defendant admits the allegations of this paragraph of the Complaint.

7 11. Defendant admits that it entered into a Collection Agreement with MCM around
8 September 1, 2004 through its partner Russell S. Thomas. The terms of that agreement are
9 written and speak for themselves. All other allegations are denied.

10 12. Defendant admits that it entered into a Collection Agreement with MCM around
11 May 6, 2006 through its partner Russell S. Thomas. The terms of that agreement are written and
12 speak for themselves. All other allegations are denied.

13 13. Defendant admits that it entered into a Collection Agreement with MCM around
14 May 6, 2006 through its partner Russell S. Thomas. The terms of that agreement are written and
15 speak for themselves. All other allegations are denied.

16 14. Defendant admits that it entered into a Collection Agreement with MCM around
17 May 6, 2006 through its partner Russell S. Thomas. The terms of that agreement are written and
18 speak for themselves. All other allegations in this paragraph are denied.

19 15. Defendant admits the allegations of this paragraph of the Complaint.

20 16. Defendant admits the allegations of this paragraph of the Complaint.

21 17. Defendant denies as stated the allegations of this paragraph of the Complaint.

22 18. Defendant admits that MCM began an audit of Defendant's records around May
23 26, 2009 and that certain lawsuits for which reimbursement of court costs had been submitted had
24 never been filed. Defendant denies that it has knowingly withheld any information from MCM as
25
26
27

1 a result of the audit and denies the balance of all other allegations in this paragraph of the
2 Complaint.

3 19. Defendant admits the allegations of this paragraph of the Complaint.

4 20. Defendant admits the allegations of this paragraph of the Complaint.
5

6 **FIRST CAUSE OF ACTION**

7 21. The responses contained in all prior numbered paragraphs are incorporated herein
8 by reference.

9 22. Defendant admits the allegations of this paragraph of the Complaint, subject to the
10 reservation that some terms or provision of the 2004 Agreement may be unenforceable or void.

11 23. Defendant admits only that MCM materially performed under the 2004
12 Agreement. All other allegations are denied.

13 24. Defendant denies the allegations of this paragraph of the Complaint.

14 25. Defendant denies the allegations of this paragraph of the Complaint.
15

16 **SECOND CAUSE OF ACTION**

17 **(Breach of Contract (the 2006 Agreement) against Trauner**
18 **by the MCM Account Owners)**

19 26. The responses contained in all prior numbered paragraphs are incorporated herein
20 by reference.

21 27. Defendant admits the allegations of this paragraph of the Complaint, subject to the
22 reservation that some terms or provision of the 2006 Agreement may be unenforceable or void.

23 28. Defendant admits only that MCM materially performed under the 2004
24 Agreement. All other allegations are denied.

25 29. Defendant admits the allegations of this paragraph of the Complaint.
26
27
28

30. Defendant admits that Plaintiff is entitled to the recovery of certain funds, subject to set-offs and *quantum meruit*. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

31. Defendant admits that Plaintiff is entitled to the recovery of certain funds, subject to set-offs and *quantum meruit*. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

THIRD CAUSE OF ACTION

(Negligence/Legal Malpractice against Trauner by the MCM Account Owners)

32. The responses contained in all prior numbered paragraphs are incorporated herein by reference.

33. Defendant admits only that it owed Plaintiff duties arising out of its contractual relationship and the attorney-client relationship pursuant to the laws of the State of Georgia. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

34. Defendant admits only that it received reimbursement for filing fees in certain cases in which complaints were not filed and the filing fee was not paid as a result of unintentional mistake or error. This Defendant denies any intentional wrongdoing. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

35. Defendant admits that Plaintiff is entitled to the recovery of certain funds, subject to set-offs and *quantum meruit*. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

FOURTH CAUSE OF ACTION

(Breach of Fiduciary Duty against Trauner by the MCM Account Owners)

36. The responses contained in all prior numbered paragraphs are incorporated herein by reference.

37. Defendant admits only that it owed a fiduciary duty to its client pursuant to the attorney-client relationship as defined within the scope of the laws of Georgia. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

38. Defendant admits only that it received reimbursement for filing fees in certain cases in which complaints were not filed and the filing fee was not paid as a result of unintentional mistake or error. This Defendant denies any intentional wrongdoing. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

39. Defendant admits that Plaintiff is entitled to the recovery of certain funds, subject to set-offs and *quantum meruit*. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

40. Defendant denies the allegations contained in this paragraph of the Complaint.

FIFTH CAUSE OF ACTION

(Fraud against Trauner by MCM)

41. The responses contained in all prior numbered paragraphs are incorporated herein by reference.

42. Defendant admits the allegations contained in this paragraph of the Complaint.

43. Defendant denies the allegations contained in this paragraph of the Complaint.

44. Defendant denies the allegations contained in this paragraph of the Complaint.

45. Defendant denies the allegations contained in this paragraph of the Complaint.

46. Defendant admits only that it received reimbursement for filing fees in certain cases in which complaints were not filed and the filing fee was not paid as a result of unintentional mistake or error. This Defendant denies any intentional wrongdoing. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

1 47. Defendant denies the allegations contained in this paragraph of the Complaint.

2 48. Defendant denies the allegations contained in this paragraph of the Complaint.

3 49. Defendant denies the allegations contained in this paragraph of the Complaint.

4 50. Defendant denies the allegations contained in this paragraph of the Complaint.

5
6 **SIXTH CAUSE OF ACTION**

7 **(Money Had and Received Against Trauner by the MCM Account Owners)**

8 51. The responses contained in all prior numbered paragraphs are incorporated herein
9 by reference.

10 52. The allegations of this paragraph are unclear as Plaintiff fails to identify the source
11 of the allegedly received and held "funds." Defendant denies that it is currently holding or has
12 ever withheld or converted any collection funds that belong to Plaintiff. All other allegations are
13 denied.

14
15 53. The allegations of this paragraph are unclear as Plaintiff fails to identify the source
16 of the allegedly received and held "funds." Defendant denies that it is currently holding or has
17 ever withheld or converted any collection funds that belong to Plaintiff. All other allegations are
18 denied.

19
20 54. The allegations of this paragraph are unclear as Plaintiff fails to identify the source
21 of the allegedly received and held "funds." Defendant denies that it is currently holding or has
22 ever withheld or converted any collection funds that belong to Plaintiff. All other allegations are
23 denied.

24 **SEVENTH CAUSE OF ACTION**

25 **(Unjust Enrichment against Trauner by the MCM Account Owners)**

26 55. The responses contained in all prior numbered paragraphs are incorporated herein
27 by reference.

56. Defendant admits only that it received reimbursement for filing fees in certain cases in which complaints were not filed and the filing fee was not paid as a result of unintentional mistake or error. This Defendant denies any intentional wrongdoing. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

57. Defendant admits only that it received reimbursement for filing fees in certain cases in which complaints were not filed and the filing fee was not paid as a result of unintentional mistake or error. This Defendant denies any intentional wrongdoing. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

58. Defendant admits that Plaintiff is entitled to the recovery of certain funds, subject to set-offs and *quantum meruit*. Defendant denies the balance of the allegations contained in this paragraph of the Complaint.

EIGHTH CAUSE OF ACTION

(Accounting Against Trauner by the MCM Account Owners)

59. The responses contained in all prior numbered paragraphs are incorporated herein by reference.

60. The terms of the Agreement speak for themselves. Defendant admits that it has complied fully with the provision identified in this paragraph of the Complaint.

61. Defendant denies the allegations contained in this paragraph of the Complaint.

62. Defendant denies the allegations contained in this paragraph of the Complaint.

63. Defendant denies the allegations contained in this paragraph of the Complaint.

NINTH CAUSE OF ACTION

(Declaratory Relief against Does 1 through 10 by the MCM Account Owners)

64. The responses contained in all prior numbered paragraphs are incorporated herein by reference.

1 65. Without knowledge of the identity of Does 1 through 10, Defendant denies the
2 allegations contained in this paragraph of the Complaint.

3 66. Without knowledge of the identity of Does 1 through 10, Defendant denies the
4 allegations contained in this paragraph of the Complaint.

5 67. Without knowledge of the identity of Does 1 through 10, Defendant denies the
6 allegations contained in this paragraph of the Complaint.

7 68. Defendant denies that Plaintiff has pled a cause of action for declaratory relief.
8 Without knowledge of the identity of Does 1 through 10, Defendant denies the allegations
9 contained in this paragraph of the Complaint.
10

11 **ON THE FIRST CAUSE OF ACTION**

12 1. Defendant denies the allegations contained in this paragraph of the Complaint.
13

14 **ON THE SECOND, THIRD AND FOURTH CAUSES OF ACTION**

15 2. Defendant denies the allegations contained in this paragraph of the Complaint.

16 3. Defendant denies the allegations contained in this paragraph of the Complaint.

17 **ON THE FIFTH CAUSE OF ACTION**

18 4. Defendant denies the allegations contained in this paragraph of the Complaint.

19 5. Defendant denies the allegations contained in this paragraph of the Complaint.

20 6. Defendant denies the allegations contained in this paragraph of the Complaint.
21

22 **ON THE SIXTH AND SEVENTH CAUSES OF ACTION**

23 7. Defendant denies the allegations contained in this paragraph of the Complaint.

24 **ON THE EIGHTH CAUSE OF ACTION**

25 8. Defendant denies the allegations contained in this paragraph of the Complaint.

26 **ON THE NINTH CAUSE OF ACTION**

27 9. Defendant denies the allegations contained in this paragraph of the Complaint.
28

ALL CAUSES OF ACTION

10. Defendant denies the allegations contained in this paragraph of the Complaint.

11. Defendant denies the allegations contained in this paragraph of the Complaint.

Any allegations contained in Plaintiff's Complaint not specifically admitted herein are hereby denied.

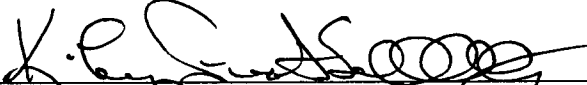
WHEREFORE, for the reasons more fully set forth in this Answer, Defendant TRAUNER, COHEN & THOMAS, L.L.P. (n/k/a Thomas & Cohen, L.L.P.) having fully answered the Complaint, prays that Defendant prevail on all the aforesaid defenses, that judgment be entered consistent with this Answer, that all costs be cast upon the Plaintiff, that a trial by jury be awarded to Defendant on all issues so triable and for such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

TRAUNER, COHEN & THOMAS, LLP hereby demands a trial by jury in this action.

DATED: October 2, 2009.

HAWKINS, PARNELL & THACKSTON, LLP


By: K. Lynn Finateri Silbiger (SBN 196488)
Attorney for Defendant
TRAUNER, COHEN & THOMAS, LLP

1 K. Lynn Finateri Silbiger (SBN 196488)
2 HAWKINS, PARNELL & THACKSTON, LLP
3 444 South Flower Street – Suite 1100
4 Los Angeles, California 90071
5 Telephone: (213) 486-8000
6 Facsimile: (213) 486-8080
7 Email: *lfinateri-silbiger@hplegal.com*

8 Attorney for Defendant
9 TRAUNER, COHEN & THOMAS, LLP

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

11 MIDLAND CREDIT MANAGEMENT, INC., a
12 Kansas corporation; MIDLAND FUNDING, LLC,
13 a Delaware limited liability company; MRC
14 RECEIVABLES CORPORATION; a Delaware
15 corporation; and MIDLAND FUNDING NCC-2
16 CORPORATION, a Delaware corporation,

17 Plaintiffs,

18 v.

19 TRAUNER, COHEN & THOMAS, LLP, a Georgia
20 limited liability partnership, and Does 1 through 10,

21 Defendants.

CIVIL ACTION FILE
NO. _____

CERTIFICATE OF SERVICE

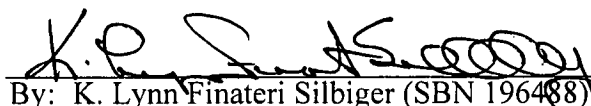
22 This is to certify that I have this date served a copy of the foregoing **ANSWER TO**
23 **COMPLAINT FOR BREACH OF CONTRACT; NEGLIGENCE/LEGAL**
24 **MALPRACTICE; BREACH OF FIDUCIARY DUTY; FRAUD; MONEY HAD AND**
25 **RECEIVED; UNJUST ENRICHMENT; AND DECLARATORY RELIEF** by depositing a true
26 and correct copy of it in the United States mail with adequate postage affixed thereon, addressed
27 as follows:

28
Kirk A. Pasich
Steven P. Inman, II
DICKSTEIN SHAPIRO LLP
2049 Century Park East – Suite 700
Los Angeles, California 90067-3109

**ANSWER TO COMPLAINT FOR BREACH OF CONTRACT; NEGLIGENCE/LEGAL MALPRACTICE;
BREACH OF FIDUCIARY DUTY; FRAUD; MONEY HAD AND RECEIVED; UNJUST ENRICHMENT; AND
DECLARATORY RELIEF**

1 DATED: October 2, 2009.

HAWKINS, PARNELL & THACKSTON, LLP

2
3 
4 By: K. Lynn Finateri Silbiger (SBN 196488)
5 Attorney for Defendant
6 TRAUNER, COHEN & THOMAS, LLP
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Midland Credit Management, Inc, et al. v. Trauner, Cohen & Thomas et al.

2 **PROOF OF SERVICE**

3 **STATE OF CALIFORNIA, COUNTY OF SAN DIEGO**

4 I declare that I am employed by Hawkins, Parnell & Thackston, LLP. I am over the age of
5 eighteen years and not a party to the within cause; my business address is 444 South Flower
6 Street, Suite 1100, Los Angeles, California 90071-2901.

7 On the date set forth below, I served the foregoing document(s) described as:

8 **ANSWER TO COMPLAINT FOR BREACH OF CONTRACT; NEGLIGENCE/LEGAL**
9 **MALPRACTICE; BREACH OF FIDUCIARY DUTY; FRAUD; MONEY HAD AND**
10 **RECEIVED; UNJUST ENRICHMENT; AND DECLATORY RELIEF**

11 On the parties in said cause.

12 Kirk A. Pasich
13 Steven P. Inman, II
14 DICKSTEIN SHAPIRO, LLP
15 2049 Century Park East, Suite 700
16 Los Angeles, CA 90067

17 ☒ **BY MAIL:** by enclosing a true copy thereof in a sealed envelope and, following ordinary
18 business practices, said envelope, with postage pre-paid, was placed for mailing and
19 collection (in the offices of Hawkins, Parnell & Thackston, LLP) in the appropriate place
20 for mail collected for deposit with the United States Postal Service. I am readily familiar
21 with the Firm's practice for collection and processing of correspondence/documents for
22 mailing with the United States Postal Service and that said correspondence/documents are
23 deposited with the United States Postal Service in the ordinary course of business on the
24 same day.

25 ☐ **BY FACSIMILE:** by facsimile to the facsimile number(s) of the offices of the
26 addressee(s) as indicated above. Fax service is equivalent to personal service pursuant to
27 Trial Setting Order.

28 ☐ **BY PERSONAL SERVICE:** by enclosing a true and correct copy thereof in a sealed
envelope(s), addressed as above, and causing each envelope(s) to be hand-served on this
day by courier service following ordinary business practices.

I declare under penalty of perjury that the foregoing is true and correct, and that this
declaration was executed on October 2, 2009, at Los Angeles, CA.



Signature

Charman Bee

Print Name